No. 21015

United States
COURT OF APPEALS
For the Ninth Circuit

MARYLAND CASUALTY COMPANY,
a Maryland Corporation,

Appellant,

v.

CLEAN-RITE MAINTENANCE COMPANY,
an Oregon Corporation,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE BRUCE R. THOMPSON, District Judge

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JURISDICTION

Appellee adopts the appellant's statement of jurisdiction which adequately shows the jurisdictional basis of the appeal.

STATEMENT OF THE CASE

The appellee accepts the Statement of the Case set forth in appellant's brief, but desires to enlarge upon the same in a few brief particulars.

Mr. Victor J. Hill, President of the defendant Clean-Rite Maintenance Company (Tr. 12) testified as witness for plaintiff that in 1963 he had discussed with Mrs. Relos, manager of the Postal Building (Tr. 31), the question of cleaning windows for the Postal Building, she asked for a quotation, and he met her once or twice before he actually did the work (Tr. 11). He gave her a quotation on a one-time basis, there was no contract (Tr. 11), and a subsequent proposed agreement for a bimonthly cleaning of the building was sent to Mrs. Relos after the initial cleaning of the building (Tr. 13). On the only occasion that Clean-Rite did clean the windows of the Postal Building, Clean-Rite's employee, Lee Ramsey, fell from the fourth floor on June 12, 1963, and was injured (Tr. 10). After the fall and the injury to Mr. Ramsey, he sent on August 6, 1963, a written outline of a proposed agreement to Mrs. Relos (Tr. 15) which was entered as Plaintiff's Exhibit 1 (Tr. 47). This agreement read: "We carry Workmen's Compensation $100,000 and $300,000, contractor's public liability and $100,000 third party property damage, insurance to protect you in case of accidents. All of our employees are covered under our $10,000 blanket fidelity bond." (Tr. 16). At the time he first talked to Mrs. Relos in the spring of 1963, he had a public liabil-

ity policy with Zurich Insurance Company (Tr. 17) entered as Plaintiff's Exhibit 5 (Tr. 18).

Mrs. Charlotte Relos testified for plaintiff that during her first conversation with Mr. Hill in 1963 he told her he carried extra insurance with the Zurich Insurance Company, and that is why he had to charge a bit more (Tr. 32). At this time the Postal Building was covered by a liability insurance policy issued by appellant (Tr. 31), with $100,000 protection from 9/22/62 to 9/22/65 (Tr. 71).

On cross-examination Mrs. Relos stated that Mr. Hill told her they would be completely covered if anything arose, and so far as his operations were concerned, she was fully protected (Tr. 40). He told her he had a type of bond and extra insurance with Zurich, and this was the extent of their conversation outside of the fact they were going to have a written contract, but there never was a written contract (Tr. 41). She wrote a letter on August 29, 1963, to Mr. Hill at Clean-Rite Maintenance Company, stating in part that "it occurs to me now in view of your earlier comments about insurance that the Postal Building might be covered for this claim under your insurance policies" (Tr. 43).

Victor J. Hill testified for defendant that he was on the scene of the accident about thirty minutes after it had happened (Tr. 55), and that his inspection revealed that the wood the anchor bolt was attached to was rotten, and the bolt pulled out of the building (Tr. 56). The words in his advertisement in the telephone books "fully insured for your protection" meant there

was protection against his employees' act such as stealing, but it did not mean to cover anything that occurs through the fault of the building owner, he could not cover a third party for negligence on their part (Tr. 59).

Kenneth A. Wicklund, a claim adjuster for Maryland Casualty Company, took a statement from Mrs. Relos on June 13, 1963, at which time there was no mention by Mrs. Relos about any insurance coverage being provided by defendant (Tr. 67). He took a further statement from Mrs. Relos on August 1, 1963, which stated: "Nothing was ever said by either one of us in which we used the words 'hold harmless agreement'," and that is what Mrs. Relos related to him at that time (Tr. 70). He examined the room from which Mr. Ramsey fell, and noticed the wood frame on the outside of the building was broken, the I-bolt was missing because it had remained fastened to Mr. Ramsey's belt (Tr. 71-72).

In counsel's arguments on the motion for directed verdict, the court asked counsel for plaintiff what he thought the most favorable view of the evidence shows with respect to what this contract was (Tr. 86), and plaintiff's counsel informed the court that he thought the most favorable view to the plaintiff is that Mr. Hill on behalf of Clean-Rite promised he had and would procure insurance to protect and hold harmless the Postal Building, its owners and operators, from any harm or damage which might befall anyone in or around the Postal Building, related to Mr. Hill's company's operations in washing windows (Tr. 86).

SUMMARY OF ARGUMENT

The District Court did not err in granting a directed verdict in favor of the defendant, on the grounds that the plaintiff did not prove with substantial evidence the terms of a contract of insurance or to procure insurance which would indemnify the plaintiff's insured for its own acts of negligence. There is no distinction made in Oregon law as to the legal requirements to enforce an oral contract of insurance or to insure.

The defendant will also contend that plaintiff did not have standing to bring an action for subrogation, as the equities did not preponderate in favor of the plaintiff as to entitle it to pursue a subrogation claim.

In addition defendant will contend that an oral contract to indemnify another against his own negligence is not enforceable unless such intention to indemnify is expressed in clear and unequivocal terms.

ARGUMENT

1. A material issue must be proved with substantial evidence without conjecture and speculation, before a jury question is presented.

It is elementary that in this case, as in any other case, before a plaintiff can make a jury question upon a material issue, there must be presented substantial evidence on this issue which will not require the jury to resort to conjecture and speculation. This concept, of course, becomes important in a case of this nature where the plaintiff is claiming that the trial court erred in determining there was insufficient evidence as

a matter of law to establish plaintiff's case, which, therefore, precluded the submission to the jury of this purported insurance agreement. On this subject the Oregon Court has stated:

> ". . . What is required is evidence from which reasonable men may conclude that, upon the whole, it is more likely that there was negligence than that there was not. Where the conclusion is a matter of mere speculation or conjecture, or where the probabilities are at best evenly balanced between negligence and its absence, it becomes the duty of the court to direct a jury that the burden of proof has not been sustained. . . . The quotation is directed to decisions on negligence but it is applicable to the proof of any fact. . . ." *Beeler* v. *Collier,* 80 Or. Adv. Sh. 411, 412-413, — Or. —, 400 P.2d 541.

Therefore, regardless of whether the plaintiff is relying upon the contract to procure insurance, or was required to establish the terms of a contract of insurance, it was incumbent upon the plaintiff to prove some substantial evidence as to just what type of insurance burden he contended the defendant had undertook to assume. It is the appellee's position that there was no such substantial evidence, and that the trial court properly removed this element from the jury's consideration and ordered a directed verdict, because of this failure of proof.

2. The appellate court can examine sufficiency of all grounds presented in defendant's motion for directed verdict, in addition to the ones relied upon by trial court.

While the main thrust of this appeal will be directed

to the lack of proof by plaintiff of the alleged agreement to insure Postal Building for its own negligence in maintaining an unsafe place for defendant's employee to work, as will be seen at (Tr. 76, et seq), defendant also contended in the directed verdict motion that the plaintiff was not entitled to subrogation. The appellee also intends to bring this lack of right to subrogation before this court, and is entitled to do so by Oregon law even though the trial court did not pass upon this ground. Authority for this proposition is set forth as follows:

> "The plaintiff's sole assignment of error is the action of the trial court in directing a verdict for defendant. The trial court ruled that the evidence was insufficient to raise a question of fact, to be determined by the jury, as to negligence or non-negligence of the defendant. Since the defendant's motion to direct a verdict included other grounds than the one ascribed by the trial court for its action, it is necessary to consider each ground of the motion." *Oregon Mutual Fire Insurance Company, et al v. Mathis*, 215 Or 218, 220-221, 334 P2d 186.

3. Directed verdict in favor of defendant was proper because plaintiff did not have standing as a subrogee to maintain this action in the trial court.

It will be seen from Item (5) of "Plaintiff's Contentions", Page 3 of the Pre-Trial Order in this case, that plaintiff claimed:

> "That plaintiff is subrogated to all the rights of the estate of Marie A. Caraplis against the defendant, if there is a right of subrogation under the facts of this case."

It will also be seen that under "Defendant's Contentions", Item (1), that the defendant claimed:

> "Plaintiff is not entitled to subrogation under the circumstances of this case."

The right of subrogation in Oregon is not absolute, but is modified by equitable principles. The Oregon Supreme Court has stated:

> ". . . True subrogation only lies where one secondarily liable pays the debt of another and not where one primarily liable pays his own debt." *Newell* v. *Taylor,* 212 Or. 522, 532, 321 P.2d 294 (citing *American Surety Company* v. *Bank of California* (9th Cir. D.C., Or.) 133 F.2d 160).

The Ninth Circuit case relied upon by the Oregon Court in *Newell* v. *Taylor,* stated the rule as follows:

> "The right of subrogation is a creature of equity, applicable where one person is required to pay a debt for which another is primarily responsible, and which the latter should in equity discharge. In theory one person is substituted to the claim of another, but only when the equities as between the parties preponderate in favor of the plaintiff. That is, a surety's right of recovery from a third party through subrogation does not follow, as of course, upon proof that the losing but recompensed party could have recovered from the third party. Accordingly, subrogation will not operate against an innocent person wronged by a principle's fraud. A surety may pursue the independent right of action of the original creditor against a third person, but it must appear that the said third person participated in the wrongful act involved or that he was negligent, for the right of recovery

from a third person is merely conditional in contrast to the right to recover from the principle which is absolute. The equities of the one asking for subrogation must be superior to those of his adversary. If the equities are equal or if the defendant has the greater equity, subrogation will not be supplied to shift the loss." (Page 162 of the Opinion).

This case went on to say:

"Since Insurers expressly volunteered and for a compensation guaranteed against loss in the exact situation involved, the equity in the situation cannot lie in favor of the Insurers and against the Bank for the payment made." (Page 164 of the Opinion).

The case finally determined that the plaintiff had no right of subrogation.

In the case at bar Maryland Casualty Company expressly volunteered and "for a compensation guaranteed against loss in the exact situation" which was involved in this case. We feel it is somewhat fortuitious for appellant to claim that there was not sufficient evidence of negligence of the operators of the Postal Building (App. Br. 14). In fact it was undisputed, and confirmed by Mr. Wicklund, appellant's own insurance claim adjuster, that the I-bolt being used by Mr. Lee Ramsey pulled out of the rotted woodwork of the building, causing him to fall to the ground. Now the appellant is trying to avoid its primary duty for which it had received a premium, and shift it *in toto* to the appellee, who had no participation in the negligent act

involved, but whose only contact with appellant's insured was some vague allegations that there was full insurance for the protection of the Postal Building. Appellant apparently did not pay the sum of $22,500 to Mr. Lee Ramsey, if it did not feel there was primary liability on the part of its insured, and being the primary target of this threatened action by the injured employee, this appears to be a good example of a case where "subrogation will not be supplied to shift a loss."

4. Appellant failed to introduce substantial evidence of a contract of insurance, or the terms of insurance contract to be procured by appellee.

The fact that appellant is claiming appellee agreed to insure and indemnify it against appellant's insured's own negligence will be discussed in the next argument. Appellant attaches a great deal of importance to the fact there must be some arcane distinction between a contract of insurance, and a contract to procure insurance. If there is a distinction, and the words "to procure" have some recondite significance, the appellee asks the question, "to procure *what* insurance"? If the appellant had ordered some special window glass from India, for example, and the glass fell from a barge in the Ganges River, did the appellee insure against this loss? Surely the terms must have some certainty so that a court and jury can determine what burden was undertaken by the appellee, we stretch the bounds of common sense to contend that some "puffing" about the insurance program carried by appellee bound him to insure the appel-

lant for every possible and foreseeable risk which might ensue. Regardless of the semantics, the Oregon Court has long recognized that a contract to insure must be proved with the same certainty as is necessary to prove a contract of oral insurance. The Oregon Court has stated:

> "In order to make a valid contract of insurance," says Mr. Wood, in his work on fire insurance (Second Edition), Sec. 5, "several things must concur: "First, the subject matter to which the policy is to attach, must exist; second, the risk insured against; third, the amount of indemnity must be definitely fixed; fourth, the duration of the risk; and, fifth, the premium or consideration to be paid therefore must be agreed upon, and paid, or exist as a valid legal charge against the party insured where payment in advance is not a part of the condition upon which the policy is to attach. The absence of either or any of these requisites is fatal in cases where a parol contract of insurance is relied upon. It is not the duty of courts to make contracts for parties, but to interpret the engagements they have undertaken and, in view of this legal principle, the rule is well settled, that, before a contract of insurance *or to insure* can become binding, all these necessary elements must be understood, assented to and agreed upon, either expressly or by implication, before there can be an absolute binding obligation between the parties." *Cleveland Oil Co.* v. *Insurance Society,* 34 Or. 228, 233-234 (emphasis supplied)

More recently the Oregon Court has said:

> ". . . If the contract in any case is so indefinite as to make it impossible for the Court to decide just what it means, and fix exactly the legal liabil-

> ity of the parties, it cannot result in an enforceable [sic] contract . . ." *Landgraver* v. *DeShazer,* 239 Or. 446, 447, 398 P.2d 193.

It will be noted that at (Tr. 87) the trial court questioned counsel for appellant as to how much insurance appellee had to provide, and counsel indicated sufficient insurance to cover any loss or harm. Suppose for example instead of a rotting window frame giving away, a whole side of the building had collapsed at the same time killing and injuring hundreds of people with damage claims in the millions—did appellee accept this burden merely by claiming "fully insured for your protection?" Or if the entire building was destroyed by fire at this time, did Mr. Hill promise to "procure" insurance to cover the loss?

On page 9 of Appellant's Brief are set forth two or three portions of the pre-trial order, and it is seen that the issues of fact included "(2) If so, what are the terms of such agreement?" The same page also sets forth the issues of law which were stated to be "(2) If so, are the terms of this contract definite enough for the court to fix the exact legal liability of the parties?" That is what this case is all about, if the appellee contracted to undertake the vast burden referred to by the appellant, what does the trier of fact have to work with to determine the appellee's responsibility for the terms of this purported agreement. For example, in Oregon since 1952 in the case of *Oregon Auto Insurance Company* v. *United States Fidelity and Guarantee Company*

(9th Cir., D.C. Or.), 195 F.2d 958, the Court of Appeals for the Ninth Circuit recognized that when two automobile liability insurance policies cover the same risk, they pro-rate their share of the risk in proportion to their coverage limits. While this refers to an automobile policy, there seems no logical reason why this doctrine should not extend to any case where two liability policies cover the same risk. Of course, this doctrine of pro-rating insurance policies is well adopted in Oregon in the case of *Lamb-Weston, Inc., et al* v. *Oregon Auto Insurance Company* (1959), 219 Or. 110, 341 P.2d 110, 346 P.2d 643. Had this point ever been reached in the trial, the appellee was going to contend that its liability, if any, should pro-rate with the $100,000 liability policy carried by appellant. [This point was discussed by counsel for appellee (Tr. 84).] But in what proportion? Without some evidence of the terms of the policy agreed upon there is nothing to substantiate as to how much the appellee or the appellant should contribute to this risk.

Assuming there is some merit in plaintiff's contention that all that is involved here is a contract to procure insurance, there is not a scintilla of evidence that appellee ever agreed to procure insurance. All Mrs. Relos testified to over and over again was that the appellee told her he was well insured and that is why his rates maybe were a little higher. If she relied upon the advertising in the telephone book, all it said was "fully insured for your protection." In fact, Mrs. Relos on cross-examination stated Mr. Hill told her they would be completely covered if anything arose and that

"so far as his operations were concerned, you were fully protected" (Tr. 40). It will be seen at (Tr. 41) that this conversation about the type of insurance he carried was the sole substance of their conversation on this point. And, of course, this is exactly true, that as far as Mr. Hill's operations were concerned, she was fully protected. For example, if Mr. Lee Ramsey negligently dropped a bucket on the head of a passerby, his insurance with Zurich-American Insurance Co. was available to protect the Postal Building. Mr. Hill wrote to her after the accident to confirm their agreement in writing, and pointed out at (Tr. 16):

> ". . . we carry Workmen's Compensation, $100,000.00 and $300,000.00, contractor's public liability and $100,000.00 third party property damage, insurance to protect you in case of accidents. All of our employees are covered under our $10,000.00 blanket fidelity bond."

But it wasn't *his* operations that brought any insurance policy into play in this case, it was the negligence of the Postal Building operators that brought Maryland Casualty Company into the picture to face its primary duty as the liability insurer for the negligent acts of the operators of the Postal Building. Appellant has not pointed to any specification of evidence where Mr. Hill contracted to go out and "procure insurance," their entire conversation was directed to his existent insurance program. The very word "procure" is couched in the future tense, and defined as "to get or obtain," "to cause or bring about." Mr. Hill never agreed to go out and buy insurance for Mrs. Relos, merely pointed out that he was in-

deed "fully insured for your protection," but, of course, only as to his own faults. As Mr. Hill pointed out, he could not cover a third party for negligence on their part (Tr. 59). The appellant admits in his brief at page 13, that appellant only adduced proof that the risk or harm insured against was harm or risk "arising out of the appellee's operation." That is exactly why appellee carried its liability policy. But the harm in this case arose out of appellant's own neglect, not "appellee's operations."

Another interesting point not raised by appellant is the fact that during the entire time she was discussing this window cleaning job with Mr. Hill, Mrs. Relos had her own $100,000 liability policy with Maryland Casualty Co. effective 9-22-62 to 9-22-65 (Tr. 71). Obviously if she was so vitally interested in Mr. Hill's insurance program, this interest did not extend to her own liability, which was fully protected. It seems sheer sophistry for her subrogee to now come into court in her shoes claiming she relied upon Mr. Hill to indemnify her for her own negligence, when she was adequately protected at all times relevant in these proceedings.

Regarding appellant's contention at page 13 of appellant's brief, that the premium can be computed by taking into account the previous maintenance contract, it should be pointed out that Mr. Hill's price included cleaning the windows at Mrs. Relos' private residence (Tr. 23). There is not a word in the record that any consideration ever changed hands to support this purported agreement.

In sumary, therefore, whether the appellant was required to establish by substantial evidence the terms of this purported oral contract of insurance, or only to establish a contract to insure, before it can become binding upon the appellee there must be some proof of the terms in order that justice can be done by our courts of law. The *Cleveland Oil Company* v. *Insurance Society* case, supra, was more recently cited with approval in *Cerino* v. *Oregon Physicians Service,* 202 Or. 474, 484-485, 276 P.2d 397, where the Oregon court said:

> "When a parole contract of insurance is relied upon to sustain a recovery of damages resulting from a breach of the agreement, or to enforce a specific performance of the terms which have been mutually assented to, the existence of the contract must be conclusively established."

The appellee contends this was one of the burdens of the appellant in this case, and the trial court properly determined that this burden had not been met, and that a directed verdict was proper in favor of the appellee.

5. In the absence of explicit agreemnt an indemnity agreement will not be construed to save the indemnitee harmless from his own negligence.

The appellant claims at page 14 of Appellant's Brief that the appellant proved a sufficiently definite contract to indemnify against its own negligence. The appellant is saying in substance in this case, that the appellee agreed to procure insurance to protect the estate from all claims, which is in essence a form of indemnity

or "hold harmless" agreement. Initially it might be noted at (Tr. 70) that Mrs. Relos gave a statement to the insurance adjuster for the appellant on August 1, 1963, shortly after the accident, that "now, nothing was ever said by either one of us in which we used the words 'hold harmless agreement.' "

Regarding the type of proof necessary to establish that a person agrees to indemnify another from that person's own acts of negligence, the Oregon court has said:

> "It is a firmly established rule that contracts of indemnity will not be construed to cover losses to the indemnitee caused by his own negligence unless such intention is expressed in clear and unequivocal terms. In Perry vs. Payne, 217 Pa. 252, 262, 66 Atl. 553, 11 LRA (NS) 1173, the court said: 'We think it clear, on reason and authority, that a contract of indemnity against personal injuries should not be construed to indemnify against the negligence of indemnitee unless it is so expressed in unequivocal terms. The liability on such indemnity is so hazardous, and the character of indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation. *No inference from words of general import can establish it.*" (Emphasis supplied) *Southern Pacific Co.* v. *Layman,* 173 Or. 275, 279, 145 P.2d 295.

While we agree that Oregon Supreme Court decisions have recognized that persons can enter into formal agreements exonerating them from the consequences of

their own negligence, this is such a hazardous undertaking that all courts, including Oregon, are extremely reluctant to find such an agreement of indemnification unless there is a very high degree of proof that this was the party's intent. Again using a somewhat attenuated argument to underscore this problem, suppose Mrs. Relos had gone to India to obtain the window glass referred to in appellee's arguments above, and had negligently dropped a piece of glass on the Calcutta salesman's foot —did Clean-Rite Maintenance Company insure her for this act of negligence? It will be seen from (Tr. 90) that the trial court was well apprised of this rule of law, and cited the case of *Glens Falls Indemnity Company* v. *Reimers,* 176 Or. 47, 155 P.2d 923, in which case there was a written indemnity agreement containing the following language:

> "The contractor assumes all responsibility for damage to property or persons and will save and hold harmless the company, its officers, agents and employees from all liability for personal injury and from costs, charges or expense reasonably incurred by the company on account of such damages, injury or claims, therefor which may arise or result from the performance, non-performance or mal-performance of this contract."

In spite of this written contract with a written indemnity agreement, the Supreme Court held it would not be construed to indemnify the indemnitee against the consequences of its own negligence. The appellee is also of the opinion that in the case of *Unitec Corporation* v. *Beatty Safway Scaffold Company,* 358 F.2d 470

(9th Cir. 1966), cited by appellant, this court construed the agreement involved to include indemnification for the indemnitee's negligence, because the indemnitor had in the same agreement agreed to procure a policy of liability insurance. Both the trial court and this court also concluded that the indemnitor in the *Unitec* case was partially responsible for the damages that incurred, whereas in the case at bar the only proof in the record indicates that it was the indemnitee's own acts of negligence that gave rise to this entire proceeding, and in which no fault was shown on the part of appellee.

Counsel for appellant's own version at the trial of what his case was all about strikingly underscores the fact that there never was any claim that appellee agreed to indemnify the Postal Building for its acts of negligence. As will be seen at (Tr. 86), the following occurred:

> "The Court: You tell me what you think the most favorable view of the evidence shows with respect to what this contract was.
>
> Mr. Foley: I think the most favorable view to the plaintiff, your Honor, is that Mr. Hill, on behalf of Clean-Rite, promised that he had, and would procure during the term of this one-year window washing agreement, insurance to protect and hold harmless the Postal Building, its owners and operators, from any harm or damage which might befall any one in or around the Postal Building, *related to Mr. Hill's company's operations in washing windows.*" (emphasis supplied)

And yet there never was any proof that any harm or damage resulted from Mr. Hill's "operations," the harm

resulted from the negligence of the Postal Building, in having window-washing I-bolts attached to rotted woodwork which gave away. Appellant's own counsel, therefore, admits that after hearing the evidence most favorably to the appellant, there was no proof that there would be any indemnification for the negligence of the Postal Building. Mr. Hill had adequate insurance to protect from harm resulting from his own operations (Tr. 16), and the trial court properly refused to submit this case to the jury. As was said in *Southern Pacific Company* v. *Layman,* supra, when referring to an indemnity agreement being construed to cover losses to the indemnitee caused by his own negligence, "no inference from words of general import can establish it." All we have in this case is some "puffing" by Mr. Hill that he had a full insurance program available. Indeed he had, but there was no proof of the drastic and hazardous type of indemnification agreement sought to be established by appellant herein.

CONCLUSION

Appellant has three hurdles to overcome before this Court can say that there has been reversible error in this case. First there must be a showing that the appellant is entitled, as a condition precedent to bringing this action, to the right of subrogation. There is respectable Ninth Circuit and Oregon authority that one is entitled to subrogation "only when the equities as between the parties preponderate in favor of the plaintiff." The plaintiff in this case, Maryland Casualty Company, for

a premium issued the policy insuring against exactly the type of harm which occurred in this case, i.e., stemming from the negligence of the owners of the Postal Building. Appellee contends that this is a perfect example of a case where, "if the equities are equal or if the defendant has the greater equity, subrogation will not be supplied to shift the loss." *American Surety Co.* v. *Bank of California,* supra)

If appellant is entitled to subrogation, then the appellant had to show by substantial evidence that appellee agreed in some manner to also insure the operators of the Postal Building for every type of risk which possibly could be imagined, according to the pre-trial order and appellant's contentions in its brief. If there is some merit to appellant's position that a contract "to procure" insurance has some vital distinction from a contract to enforce an oral contract of insurance, there still must be some terms of this alleged contract shown to apprise the appellee of what he was facing. Yet at the trial, appellant proved nothing except that the appellee had told Mrs. Relos that he was fully insured. Mrs. Ralos summarized their entire conversation by stating Mr. Hill contended "so far as *his operations* were concerned, you were fully protected" (Tr. 40). At the trial on the argument for motion of directed verdict, plaintiff's counsel took the same position, that the Postal Building was protected from actions "related to Mr. Hill's company's operations in washing windows" (Tr. 86). Yet the injury which gave rise to this law action arose from the "operations" of the Postal Building—at

all times Mr. Hill was insured for his own operations. It is somewhat cynical for Mrs. Relos to contend that Mr. Hill was promising to insure her for her own negligence, rather than his own acts, when at all times the subject of insurance was being discussed with Mr. Hill, she carried her own $100,000 liability policy with appellant.

Finally, appellant must show that the appellee had undertaken the extreme burden of agreeing to provide an indemnity policy of insurance, saving the Postal Building harmless for its own acts of negligence. When it comes to such extraordinary agreements, the Oregon court has recognized that the liability on such indemnity is so hazardous, and the character of indemnity so unusual and extraordinary, that "no inference from words of general import can establish it" (*Southern Pacific Company* v. *Layman,* supra, page 279). These words could have been written with this case in mind, the only proof adduced by appellant at the trial was a conversation or two between Mrs. Relos and Mr. Hill to the effect that she would be fully insured from his operations, and these are only words of "general import."

The trial court properly refused to submit this case to the jury.

Respectfully submitted,

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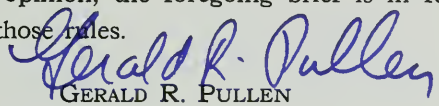
By: GERALD R. PULLEN
Attorneys for Appellee

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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